FILED

MAY 07 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INEZ TITO LUGO, Petitioner - Appellant, v. CAL A. TERHUNE; ANNA M. RAMIREZ-PALMER; ROBERT K. ANDERSON, Respondents - Appellees.	No. 07-16031 D.C. No. CV-99-01151-LKK MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Senior Judge, Presiding

Argued and Submitted April 14, 2008
San Francisco, California

Before: SCHROEDER, NOONAN and CALLAHAN, Circuit Judges.

In this habeas appeal, the petitioner, California state prisoner Inez Tito Lugo, challenges his second-degree murder conviction on the ground that the district court failed to obtain a waiver from the defendant of his right to be present at a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

playback of his interrogation and readbacks of two witnesses' testimony to the jury. The district court denied the petition, holding that there had been no showing of harmful error. See Lugo v. Warden of Cal. Med. Facility, No. 99-1151, 2007 WL 662226, at *6 (9th Cir. Feb. 28, 2007).

In our circuit, a defendant generally has a constitutionally protected right to be present during any readback or playback of testimony. See Turner v. Marshall, 63 F.3d 807, 814 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677, 685 (9th Cir. 1995); United States v. Kupau, 781 F.2d 740, 743 (9th Cir. 1986). In this case, the trial judge failed to obtain a waiver from the defendant of that right. See Turner, 63 F.3d at 815. However, the trial judge obtained a stipulation to the readback procedure in advance from the defense attorney, provided that counsel was given notice of any request from the jury. When such notice was given for the readbacks, there was apparently no objection. With respect to the playback, the judge instructed the jury on the playback procedure in the presence of the defense attorney before deliberations began.

After the verdict, the defense counsel indicated he had an objection to the readback procedure, but no record was ever made. When the district court appointed federal habeas counsel to conduct an investigation, petitioner was unable to develop factual support for these claims of harm. This record therefore contains

no indication of what, if anything, went wrong with the readbacks and playback that could have prejudiced petitioner in his absence. It is incumbent upon the petitioner to establish a "'substantial and injurious effect or influence'" flowing from constitutional trial errors. See Hegler v. Borg, 50 F.3d 1472, 1477 (9th Cir. 1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). There was error, but in the absence of any showing of prejudice, the conviction must stand.

Petitioner relies upon our decision in Fisher v. Roe, 263 F.3d 906 (9th Cir. 2001), overruled on other grounds by Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003), reversed by Brown v. Payton, 544 U.S. 133 (2005). We there held that defendant Fisher's due process rights were violated when the trial court conducted a secret readback of testimony without notifying the defendant or his counsel of the jury's request in advance. That did not occur in this case.

The petitioner also challenges the absence of the trial judge at the readbacks/playback. We have held that the presence of the judge is not always required, depending on the circumstances of the particular case. See United States v. Arnold, 238 F.3d 1153, 1155 (9th Cir. 2001). The order of the magistrate, which was adopted by the district court, recognized that the trial judge was maintaining control of these proceedings while attending to the more pressing

demand of another proceeding. The parties agreed in advance to the procedures that were utilized, and there was no error.

AFFIRMED.